

Frank Pimentel
Fialho & Sons Dairy
665 Valentine Court
Galt, CA 95632-3312
ACL Complaint No. R5-2011-0548

HEARING PANEL REPORT AND PROPOSED ORDER

This matter was heard on 20 July 2011, at 1685 E Street, Fresno, California before a panel consisting of Regional Board Members [Name], [Name], and [Name]. Alex Mayer and Ken Landau were Panel Advisors. [Name] appeared on behalf of [owner/operator] (Discharger). Pamela Creedon, Clay Rodgers, Robert Busby, Charlene Herbst, Daniel Davis and Ellen Howard and Mayumi Okamoto appeared for the Prosecution Team.

The Panel makes the following determinations:

FINDINGS OF FACT

1. The Discharger owns Fialho & Sons Dairy (Dairy) located at 13310 E. Kettleman Lane, Lodi, San Joaquin County.
2. The Dairy is regulated by the Waste Discharge Requirements General Order for Existing Milk Cow Dairies, Order R5-2007-0035 (hereinafter General Order), which was issued by the Central Valley Water Board on 3 May 2007. Monitoring and Reporting Program R5-2007-0035 (hereinafter MRP) accompanies the General Order. The General Order and the MRP contain reporting requirements for dairies regulated by the General Order. The General Order became effective on 9 May 2007.
3. The General Order and the MRP required that an Annual Report for the calendar year 2009 be submitted for regulated facilities by 1 July 2010 (2009 Annual Report), including the following components: a revised Annual Dairy Facility Assessment, with facility modifications implemented to date; and a status on facility retrofitting completed as proposed in the Nutrient Management Plan submittal that was due 1 July 2009.
4. The General Order required regulated facilities to submit a Waste Management Plan (WMP) by 1 July 2009. The General Order was amended by Order R5-2009-0029 to modify the compliance schedule, extending the deadline to submit the WMP to 1 July 2010 in order to give regulated parties additional time to come in to compliance. The WMP is required to have the following components: a retrofitting plan, with schedule, needed to improve storage capacity, flood protection, or design of production area; maps of the production area and land application area; a wastewater storage capacity evaluation; a flood protection evaluation; a production area design/construction evaluation; and documentation that there are no cross connections.
5. On 16 August 2010, the Central Valley Water Board staff issued a Notice of Violation, notifying the Discharger that the 2009 Annual Report with appurtenant components had not been received. The Notice of Violation also requested that

the delinquent report be submitted as soon as possible to minimize potential liability.

6. On 2 September 2010, the Central Valley Water Board staff issued a Notice of Violation, notifying the Discharger that the Waste Management Plan with appurtenant components had not been received. The Notice of Violation also requested that the delinquent report be submitted as soon as possible to minimize potential liability.
7. Central Valley Water Board's compliance tracking system and case files indicate that the Board has not received the 2009 Annual Report or the Waste Management Plan.
8. CWC section 13268(a)(1) states that "Any person failing or refusing to furnish technical or monitoring reports as required by subdivision (b) of Section 13267...is guilty of a misdemeanor and may be liable civilly in accordance with subdivision (b)."
9. CWC section 13268(b)(1) states that "Civil Liability may be administratively imposed by a regional board in accordance with Article 2.5 (commencing with Section 13323) of Chapter 5 for a violation of subdivision (a) in an amount which shall not exceed one thousand dollars (\$1,000) for each day in which the violations occurs."
10. On 5 May 2011, the Executive Officer issued Administrative Civil Liability Complaint (Complaint) No. R5-2011-0548 to the Discharger recommending that the Central Valley Water Board assess the Discharger an administrative civil liability in the amount of \$11,400 pursuant to CWC section 13268 for the failure to submit the 2009 Annual Report and Waste Management Plan as required by the General Order.
11. The ACL Complaint was originally issued to both Frank Pimentel, the property owners, and to Manuel Fialho, the operator of the property at the time the reports were due. The copy of the complaint mailed to Manuel Fialho was returned unclaimed. Subsequently, the Prosecution Team learned that Manuel Fialho filed for bankruptcy on 30 September 2010. The filing of bankruptcy and automatic stay of creditor claims by the federal bankruptcy court pre-dates assessment of penalties for violations cited in the Complaint. Because monetary penalties cannot be sought from Manuel Fialho without violating the stay of the court, Manuel Fialho has been removed as a party cited in the complaint.
12. The ACL Complaint mailed to Frank Pimentel was also returned unclaimed. Staff determined that the mailing address used was the most recent available for Frank Pimentel and arranged for service of the Complaint by a process service. The process service made three attempts to deliver the Complaint, on three separate days during the course of a week, at times varying from 8:39 am to 7:04 pm. None of the attempts were successful. An attempt to contact Frank Pimentel by phone on 3 June 2011 was unsuccessful as the phone had been disconnected. The complaint was finally served to Frank Pimentel's daughter on 7 June 2011 on the fifth attempt by the process service.

13. The Discharger violated the requirements of the General Order and MRP by failing to submit the 2009 Annual Report by the required deadline of 1 July 2010. As of the date of the Complaint, the 2009 Annual Report was 308 days late.
14. The Discharger violated the requirements of the General Order and MRP by failing to submit a Waste Management Plan by the required deadline of 1 July 2010. As of the date of the Complaint, the 2009 Annual Report was 308 days late.
15. On 17 November 2008 the State Water Resources Control Board adopted Resolution No. 2009-0083 amending the Water Quality Enforcement Policy (Enforcement Policy). The Enforcement Policy establishes a methodology for assessing discretionary administrative civil liability. Use of the methodology addresses the factors used to assess a penalty under CWC section 13327 including the Discharger's culpability, history of violations, ability to pay and continue in business, economic benefit, and other factors as justice may require. The required factors under CWC section 13327 have been considered using the methodology in the Enforcement Policy as explained in detail in Attachment A and shown in the Penalty Calculation for Civil Liability spreadsheet in Attachment B. Attachments A and B are attached hereto and incorporated herein by reference..
16. In general, violations of CWC section 13267 are assessed on a per day basis. Under the Enforcement Policy, an alternate approach to the penalty calculation for multiple day violations may be used if the Regional Board makes expressed findings that the violations do not cause daily detrimental impacts to the environment, result in no daily economic benefit that can be measured on a daily basis or occurred without the knowledge or control of the violator. Here the failure to submit the required reports does not cause a daily detrimental impact to the environment and does not result in an economic benefit that can be measured on a daily basis, so the alternative approach is appropriate. Under this alternate approach, daily penalties are assessed for the first day of violation, plus one day for each 5-day period of violation until the 30th day, plus a one-day assessment for each additional thirty-day period of violation. In accordance with the alternative approach, a total of 16 days of violation have been assessed for the failure to submit the 2009 Annual Report, and a total of 16 days of violation have been assessed for the failure to submit a WMP.
17. On considering the written record and evidence presented at the hearing, the Panel determined that \$11,400 should be imposed on the Discharger pursuant to CWC section 13268 for violations of CWC section 13267.

CONCLUSIONS OF LAW

1. The failure to submit the 2009 Annual report constitutes a violation of CWC section 13267.
2. The failure to submit the Waste Management Plan constitutes a violation of CWC section 13267.

3. Pursuant to CWC section 13268, the Regional Board may impose administrative civil liability up to \$1,000 for each day of violation.
4. The total maximum amount of administrative civil liability assessable for the violations alleged in Complaint No. R5-2011-0548 pursuant to CWC section 13268 is \$616,000.

RECOMMENDED ADMINISTRATIVE CIVIL LIABILITY AMOUNT

The Panel recommends that the Central Valley Regional Board impose administrative civil liability in the amount of \$11,400 on the Discharger for violations found herein to have been committed by the Discharger. A proposed Draft ACL Order is attached.

[Name]
Hearing Panel Chair

Date

Attachments:

Attachment A Enforcement Policy methodology

Attachment B Penalty Calculation for Civil Liability spreadsheet

Draft Order R5-2011-XXXX